

2016 Legacy Land Conservation Commission Minutes

State of Hawai'i Department of Land & Natural Resources, Division of Forestry & Wildlife

DATE: October 21, 2016
TIME: 1:30 p.m. – 3:46 p.m.
PLACE: Room 132 (Board Room)
Kalanimoku Building
1151 Punchbowl St.
Honolulu, Hawai'i

COMMISSIONERS PRESENT:

Mr. Thorne Abbott
Ms. Theresa Menard
Dr. John Sinton
Mr. Rick Warshauer
Ms. Kanoe Wilson

COMMISSIONERS ABSENT:

Dr. Wendy Wiltse
Ms. Marjorie Ziegler

STAFF:

Department of Land and Natural Resources, Division of Forestry and Wildlife

Kirsten Gallaher (RCUH)
Kristy Lam (KUPU)
Emma Yuen (Program Manager, Native Ecosystems Protection & Management)
David Penn (Program Specialist, Legacy Land Conservation)

PUBLIC:

Mr. Stephen Rafferty (The Trust for Public Land)

MINUTES:

ITEM 1. Call to order and introduction of members and staff.

Chair Menard sounded the pū to open the meeting, welcomed the commissioners, and thanked them for their service. Commissioners, staff, and members of the public introduced themselves.

Item 2. Announcements.

Ms. Gallaher introduced David Penn as the new staff coordinator.

Chair Menard requested updates on closed projects funded through Legacy Land. Penn noted that the Division (DOFAW) submitted the Legislative Report for Fiscal Year 2016 (FY16), which identifies three acquisitions that closed within the last fiscal year (Kuamo'o, Kona, Hawai'i (fee); Kaiholena South, Kohala, Hawai'i (fee); and Turtle Bay Mauka, O'ahu (agricultural easement with North Shore Community Land Trust and Trust for Public Land). Kalauao Valley, O'ahu

(fee) closed this fiscal year, and DOFAW will soon hold a public hearing about adding the land to the forest reserve system. Kahuku Coastal, Ka'ū, Hawai'i (fee) will close within the next month, putting over 3,000 acres including hawksbill turtle nesting areas, under County ownership. This is important for DOFAW because it is adjacent to the Manukā Natural Area Reserve (NAR), the state's largest NAR, and the county will be providing access over roads going into the NAR.

Chair Menard asked for any further announcements. Penn announced that several non-state acquisitions are pending, and the program will be moving ahead on several fronts. A few months ago, DOFAW requested that the Board of Land and Natural Resources (BLNR) redirect funding from the Lower Kūka'iau acquisition (FY12) to Upper Kūka'iau Ranch acquisition, and BLNR agreed that the two projects were similar enough to approve DOFAW's request.

In response to questions from the Commission, Penn clarified that the landowner withdrew from the Lower Kūka'iau project. The \$600,000 approved for that project has been sitting in the FY12 funds for state projects ever since, and will lapse back into the Land Conservation Fund unless redirected to the Upper Kūka'iau project. Redirecting this funding from makai to mauka allowed DOFAW to reduce its FY17 ask to Legacy Land for the Upper Kūka'iau Ranch project.

Penn reminded commissioners of the requirements for serving on a state commission, directed them to the website at boards.hawaii.gov, and recommended that they look over the revised Sunshine Law Manual from September 2016.

Penn mentioned the release of the final federal rule governing the agricultural conservation easement program operated by the U.S. Department of Agriculture, Natural Resources Conservation Service (NRCS) and asked the Commission to consider sending comments or feedback to the Land Trust Alliance because the next farm bill will be approaching in 2018 and may address the same program.

Commissioner Abbott inquired about the rule's treatment of impervious surface area like ponds and lakes. Penn replied that he will check it out and check back in. Mr. Rafferty noted that he has a suggestion for the Commission on the final rule, and volunteered to provide more information at a later point in the agenda.

Penn announced that he and Julie China will be in Minnesota next week for Land Trust Alliance's National Land Conservation Conference.

Chair Menard announced that she and Marigold Zoll (DOFAW) presented a poster on the Legacy Land Conservation Program at the International Union for the Conservation of Nature (IUCN) World Conservation Congress, which is posted on the IUCN website with updated infographics and maps. Co-authors also included Ms. Yuen, Ms. Gallaher, and former commissioner Lori Buchanan. Commissioner Abbott requested that the link be sent out to everyone [**see <https://portals.iucn.org/congress/session/10107>**]. Ms. Yuen mentioned the use of the map in the FY16 Legislative Report, and thanked Ms. Menard for her efforts, which beautifully shows the footprint of what we're doing.

ITEM 3. Approval of Legacy Land Conservation Commission meeting minutes from February 26, 2016.

The Commission approved, unanimously, the minutes from February 26, 2016, as corrected (moved by Menard, seconded by Wilson).

Corrections:

- Chair Menard noted the misspelling of “commission” and that a period instead of comma is needed in front of Ms. Yuen’s name on page one. Five paragraphs down on page two, “she” should be identified as Chair Menard.
- Commissioner Wilson noted that “okina” should be “okina” four paragraphs down from the bolded “Item 2” sub-heading.
- Chair Menard noted an error in the fifth paragraph on page four, “than” should be “then.” Also noted the multiple errors where “statue” should be “statute.” Another error in the second to the last paragraph, “for” should be changed to “with have.” On page seven, remove “only” from first sentence in paragraph nine. In the third paragraph on page nine, under subheading “b.,” “noticed” should be “notice.” The third line in paragraph four, under subheading “d.,” “they” should be “they were.” In the next paragraph, “they” needs to be changed to “who” on the second line.
- Commissioner Wilson noted that on the first line “Waipa” should be “Waipā.”
- Penn noted that on page two, the Item 2 bold subheading should be “minutes from” rather than “minutes form.” Also, the first line on the top of page five, “statue” should be “statute.” On page nine, under “b.,” it should be “notice” instead of “noticed.” Lastly, on page one, the “applicant” label should be with Mr. Stephen Rafferty rather than Mr. David Penn.

Item 4. Election of new Vice-Chairperson and discussion of vacant positions.

Vacancies:

Ms. Gallaher reviewed the two vacancies on the Commission. The Governor’s Boards and Commissions office completed the background check of an applicant for the land conservation organization vacancy (to replace Lori Buchanan), next step is approval by the BLNR Chairperson. The office received an application yesterday for the statewide agricultural association vacancy. Penn noted that the first vacancy will probably be filled by the current applicant, and encouraged those wanting to apply for the second position to do so. The Commission and staff discussed eligibility and timelines for filling vacancies, and field visit participation by sitting Commissioners, new appointees, and candidate appointees, with additional discussion deferred by Chair Menard to Agenda Item 6.

Substantive points of discussion:

- In general, no person shall be allowed to serve on more than one state board or commission expressly created by a statute or constitution, per Section 78-4(a), Hawai‘i Revised Statutes. However, the Legacy Land Statute creates an exception for the Chair of the Natural Area Reserves Commission to serve on the Legacy Land Conservation Commission. (Penn)
- Penn will check on Commissioner Abbott’s question about the eligibility of a DLNR employee to serve on the Commission. (Abbott)
- The seat for a member of a statewide agricultural association was vacant for about two years, but may be filled by a recent applicant in two months or so. The seat for a member of a land

conservation organization may be filled in about two weeks. (Gallaher) The new appointees will be subject to senate confirmation in upcoming legislative session, and can serve as interim members until then. (Penn)

- Ms. Yuen suggested that it would be beneficial for new/candidate appointees to attend field visits. Commissioner Abbott suggested relying on existing commission members for field visit assignments, and that a new/candidate appointee could participate as a member of the public.
 - Under Sunshine Law requirements for permitted interaction, up to four commissioners may be assigned to each field visit, and the process spans three Commission meetings. (Gallaher/Penn)
 - It may be possible for the assignments to include a new appointee whose appointment is completed prior to the field visit. (Penn)
 - Field visit assignments are closed once the Commission acts to adopt them. After that, commissioner may drop out from a field visit assignment, but an unassigned commissioner cannot be added to a field visit. (Gallaher)
 - It may be possible for a non-appointed, candidate commissioner to participate in a site visit if invited by the applicant with the landowner's permission. (Gallaher)

Election:

The Commission unanimously elected Commissioner Abbott as Vice-chairperson (nominated by Abbott, seconded by Wilson).

Prior to the election:

- Chair Menard read aloud from Section 13-140-15, Hawai'i Administrative Rules, and asked staff the reason for electing a new vice-chairperson. Ms. Gallaher and Commissioner Sinton explained that Commissioner Sinton is the appointee from the Natural Area Reserve System (NARS), and that his NARS term expires next year due to term limits. Commissioner Sinton suggested that this is a good time for a change in vice-chairperson.
- Chair Menard indicated that the vote on each nominee would occur in the order of nominations made, and that the first nominee to receive a majority of the vote is elected.

Item 5. Discussion of Legacy Land Conservation Program funding.

Ms. Yuen addressed Legacy Land funding for FY17 and FY18:

- Every year the State Legislature provides a spending ceiling of about \$5.1 million, and about \$4.5 million of this goes towards the grant process, the remainder for administrative costs
- In FY15, the grant money awarded to state projects was transferred from the Land Conservation Fund to a special account for state projects only, and the grant money awarded to non-state projects was secured under a blanket encumbrance while waiting for grant agreements to be signed and contracted with counties and nonprofits.
- At the end of FY16, the deadline passed to contract for the funds that were under the FY15 blanket encumbrance. Unfortunately, this fiscal error was due to the unfortunate events of vacancies.
- The FY15 funds that were not under contract at the close of FY16 lapsed back into the Land Conservation Fund (not the General Fund). The FY15 funds are still reserved for

Legacy Land purposes, however under the current spending ceiling DOFAW cannot access the lapsed money to pay for FY15 non-state projects.

- The contract for the Ka Iwi Coast Mauka Lands FY15 project went through in time.
- Unfunded FY15 projects are Wai‘ōpae, Waipā, and Kalua‘aha Ranch Conservation Easement. Waipā quiet title action was still being determined as of a few months ago.
- The State is committed to completing its contracts with the FY15 awardees. Fortunately, \$2.2 million is available from FY17 to fund these FY15 projects. However, that means there will be \$2.2 million less to award for FY17 projects unless the legislature reauthorizes the lapsed funding from FY15.
- A request was put in yesterday to increase the budget by \$2.2 million for FY18 in order to recover the FY15 money in FY18 to fund FY17 awards.
- For FY17, the Commission would go through its normal process, which is to recommend awards for about \$4.5 million in grants to disburse. Available funds for these awards would be only \$2.3 million, e.g. \$1.5 million for Turtle Bay plus \$800,000 for other projects. The remaining \$2.2 million in grant money would have to be awarded subject to the legislature reauthorizing FY15 money that would be made available early in FY18. So, FY17 awardees may wish to inform the Legislature that reauthorization of the FY15 money is needed for an awardee’s FY17 project to go through.

Other Substantive Points of Discussion:

- Ms. Yuen clarified that it is the DLNR’s responsibility to manage the funding that the Legislature allocated to the program; the FY15 funding lapse was not the Commission’s doing.
- Ms. Yuen noted that she talked with the Attorney General’s office about the situation, and clarified that the Legislature established the annual spending ceiling. If the Commission issues a \$ 4.5 million recommendation in FY17 projects, and DLNR contracts out \$2.2 million in grant money for FY 15 non-state projects, then BLNR can only approve \$2.3 million of FY17 funding for FY17 projects. After the legislative session is done in May, the remaining unfunded projects would have to go through the Board approval and get contracted, which would create a lag. Therefore, if the Legislature does not approve of the ceiling increase, those projects would not move forward at all.
- Commissioner Sinton asked about DLNR efforts last year to raise the ceiling make up for the \$1.5 million that is available, annually, for the state’s obligations at Turtle Bay Makai. Ms. Yuen explained that the Land Conservation Fund receives \$6.8 million in annual revenue, however the Legacy Land Conservation Program can only spend \$5.1 million of this revenue each year. Last year, DLNR’s requested a \$1.7 million increase in annual spending, so that the expenditure ceiling would equal the revenue cap. Despite DLNR’s efforts to educate legislators, the legislature rejected this request. DLNR will make the same request again for FY18. Legislative approval seems to depend upon whether or not the Legislature wants to use the Land Conservation Fund balance (above the ceiling) for particular other projects that fit the Legislature’s own priorities.

Additional spending from the Land Conservation Fund:

Penn mentioned DOFAW’s capital improvement project (CIP) funding request in the last legislative session for a land acquisition at Makahanaloa, for an addition to the Hilo Forest Reserve below Hakalau, which resulted in \$2 million being tagged from the Land Conservation

Fund above the ceiling rather than below. Of the extra money that's in the fund (above the ceiling), DOFAW now has a special account for \$2 million toward that 1,700 acre acquisition. DOFAW did not plan for this result, but that's the way it came out.

- Penn clarified that the legislature authorized a \$2 million expenditure from the Land Conservation Fund that is above, and separate from, the amount that can be expended below the ceiling.
- Ms. Yuen confirmed that there is quite a bit of money in the Land Conservation Fund, but it may be used for other legislative priorities and is not accessible for Legacy Land purposes. Mr. Penn stated that it may be at least \$10 million.

Turtle Bay Makai:

Chair Menard asked what would happen in FY17 if Turtle Bay Makai's application for \$1.5 million was not within the top \$2.3 million recommended by the Commission? Ms. Yuen replied that the BLNR could overrule the Commission's recommendation. DOFAW is unsure about what other sources of funding could be used to pay for Turtle Bay Makai debt service; the legalities of the overall situation are unknown. BLNR's funding decision is subject to consultation with the Legislature and to Governor's approval. It is unlikely that the Legislature and the Governor would agree with a BLNR decision that did not include funding for Turtle Bay Makai. The practical reality is that Turtle Bay Makai will be funded from the Land Conservation Fund, below the program's annual ceiling.

Vice-chair Abbott opined that the Commission should operate based on the premise that funding for Turtle Bay Makai will be funded from the Land Conservation Fund, below the program's annual ceiling. Commissioner Sinton countered that the Commission should operate as its conscience dictates. Rank them as we feel, do our job, and others will decide how to spend state money.

Funding recommendations in general:

Commissioner Wilson questioned whether the Commission's recommendation is for full amounts or partial amounts of money requested from applicants. Chair Menard responded that usually the top four projects or so are recommended for the full amount requested. Then, if a remaining project is recommended, it would be for the portion of that request that could be funded with the remaining award money. For example, last year DOFAW's application for the Upper Kūka'iau Ranch acquisition ranked lowest, and the Commission's recommendation could only accommodate a portion of the amount requested. However, the recommendation included a provision that DOFAW's application receive additional funding, up to the full amount requested, if higher-ranking projects dropped out of the process.

Ms. Yuen reminded the Commission that it cannot recommend cutting the requested amounts to a higher-ranked project to provide more funding to a lower-ranked project. However, an applicant can revise its application to ask for a lesser amount, before the final meeting, to attempt to improve its ranking and increase the chances of securing a funding recommendation. Chair Menard recalled, and Ms. Yuen confirmed, that DOFAW had previously employed that strategy when it decided that its initial application was too expensive, given the competition encountered in other applications.

ITEM 6. Discussion of the Fiscal Year 2017 Legacy Land Conservation Program timeline, process, site visits, and meetings; possible formation of task forces for site visits to proposed project locations.

Timeline and process:

Penn presented the timeline for the commission. The site visits will occur from November through December, followed by a two-day Commission meeting on December 12 and 13. The site visits take place under Sunshine Law provisions for permitted interaction groups. Penn noted that commissioners may wish to review charts of the process and minutes of previous meetings that are available on the Legacy Land website.

Staff and Commissioners discussed the deadlines for agency consultation forms in the application process.

Substantive points of discussion:

- Ms. Gallaher explained that DOFAW extended the Commission's initial application deadlines due to lack of staff capacity. The extended deadline for submitting the agency consultation form to a consulting agency was July 29, 2016. Per statute, the consulting state agencies are Agribusiness Development Cooperation (ADC); Department of Agriculture (DOA); and DLNR. Turtle Bay Makai did not submit the consultation forms, and Ho'oulu 'Āina submitted its forms late (August 3, 2016). The Attorney General's office indicated that the late submittal was OK because the completed consultation form is attached to the final application (which has its own deadline), but noted that this would be worth mentioning to the commission.
- DLNR and DOA responded to Ho'oulu 'Āina's consultation request; ADC did not. The lack of agency response to a consultation request does not affect an application, as long as the applicant submitted the consultation request. (Gallaher)
- Commissioner Warshauer asked whether or not the Commission should continue processing the Ho'oulu 'Āina application or hold it in abeyance. Ms. Yuen responded that it was up to the commission. Commissioner Sinton noted that the Commission does not want an agency to torpedo a project by inaction.
- Although Turtle Bay Makai did not submit the agency consultation forms, the Attorney General's office indicated that because this is a re-application, another round of agency consultation is not required. However, an application is still required, and was received, and did not indicate boundary changes or changes to the TMKs, according to the acreage. (Gallaher/Yuen)
- Vice-chair Abbott moved to accept the applications as they are and to encourage the applicants to submit agency consultation forms if they can.
- Chair Menard seconded the motion, and recalled that, in the past, the Kūka'iau and Molokai fishpond projects changed their applications to add a new or omitted TMK that was not part of the agency consultation, indicating that the Commission has been lenient about agency consultations in the past.
- Motion passed, all were in favor.

Vice Chair Abbott asked for confirmation of the Dec 12th and 13th meetings and the minimum and maximum number of commissioners per site visit. Ms. Gallaher confirmed and stated that the Dec 12th meeting will be from 9:00 AM-4:00 PM, the December 13th meeting will be

from 10:00 AM-3:00 PM.; the maximum number of commissioners per site visit is four; and the minimum is one. (Penn)

Site visits:

After discussion, and recess from 3:19-3:30 PM (moved by Menard, seconded by Wilson, all were in favor), Chair Menard read aloud from Section 92-2.5(b), Hawaii Revised Statutes, concerning permitted interactions among commissioners, and identified the scope of each investigation as a site visit, with one commissioner in each group authorized to lead and report on the site visit. The commissioners agreed unanimously to the following task force assignments for site visits assignments (moved by Sinton, seconded by Wilson):

- A. Hāloa ‘Āina (Western flank of Mauna Loa, Hawai‘i), November 4, 2016
Chair Menard (lead); commissioners Sinton, Warshauer, and Wiltse
- B. Kepler Ke‘anae Lo‘i Easement (Ke‘anae Peninsula, Maui), November 9, 2016
Vice Chair Abbott (lead); commissioners Sinton, Wilson, and Warshauer
- C. Upper Kūka‘iau Ranch Acquisition (Hāmākua, Hawai‘i), November 23, 2016
Commissioner Wilson (lead); commissioners Warshauer, Vacancy 1 (land conservation organization), Vacancy 2 (agricultural association)
- D. Ho‘oulu ‘Āina (Wailuku, Maui), November 9, 2016
Vice Chair Abbott (lead); commissioners Sinton, Wilson, and Warshauer
- E. Turtle Bay Makai (Ko‘olauloa, O‘ahu), December 2, 2016
Commissioner Wiltse (lead); commissioners Wilson, Warshauer, and Vice-chair Abbott
- F. Waikapuna (Ka‘ū Coast, Hawai‘i), December 8, 2016
Commissioner Warshauer (lead); commissioners Sinton, Wilson, and Vice-chair Abbott
- G. Ka‘alea Kalo Lands (Ko‘olaupoko, O‘ahu), December 2, 2016
Commissioner Wilson (lead); commissioners Warshauer, Wiltse, and Vice-chair Abbott

Substantive Points of Discussion:

Penn suggested that for purposes of meeting minutes, the motion to assign task forces for field visits should include the statutory buzz words about permitted interaction under the sunshine law, indicating that the decision at this meeting was to define the scope of the investigation and the scope of each group member’s authority.

Penn explained that under these provisions of the Sunshine Law, two to four commissioners may join a field visit as a permitted interaction group. A lone Commissioner may participate in a field visit. However, if more than four commissioners participate, that visit must be scheduled as a formal Commission meeting.

Ms. Gallaher clarified that a commissioner must lead each field visit and be responsible for coordinating the visit and writing/presenting a report. The Commission will present the field visit

reports during the first meeting in December. Written reports will be fairly short and a printed version of a powerpoint presentation will suffice.

Commissioner Sinton inquired about whether expenses could cover both Maui visits if they are not scheduled for the same day and instead back to back days. Penn responded that there is a cap on administrative budget for the current fiscal year (5% of the fund revenues) and that the Commission should be as conservative as possible, but expenses should be covered.

Penn stated that if the landowner and the applicant are in agreement, then it may be possible for a candidate commissioner to accompany the site visit, but expenses would not be covered by DOFAW. However, once a candidate commissioner officially joins the Commission, his/her presence counts toward quorum under Sunshine Law. An existing commissioner can drop out of a site visit now, but after that there's no turning back, he/she would be off of the site visit for good.

Penn urged commissioners to make travel arrangements for the field visits as soon as possible, especially for the early November site visits, with a reminder that arrangements for Hāloa 'Āina be done by early next week. The lead commissioner is responsible to figure out logistics with applicant, and Ms. Lam will be responsible for processing travel requests as received from the lead commissioner.

Ms. Gallaher will send out the list of deadlines, expectations for lead commissioners, applicant contact details, and Ms. Lam's contact information through an email on Monday morning.

ITEM 2. Other Announcements:

Mr. Rafferty announced that the landowner expects to resolve the Waipā quiet title action by the end of this year.

Mr. Rafferty, Commissioners, and staff continued discussing the final federal rule governing the USDA-NRCS agricultural conservation easement program and its potential revision under the upcoming Farm Bill reauthorization. Substantive points of discussion:

- The NRCS adjusted gross income (AGI) limit of \$900,000 will be an issue for Hawai'i's business owners. For the Agricultural Conservation Easement Program (ACEP) that amount is non-waivable. If a landowner's income exceeds that amount, then that landowner is excluded from the program. Before, there was a \$1 million limit that was waivable if a certain amount of landowner's income was from farming, but many ranches and farms have other operations going on, such as tourism, that generate substantial income. (Rafferty)
- Suggestion that the \$900,000 AGI limit be waived at the discretion of the state conservationist. Otherwise, it will be difficult to do conservation easements with large landowners. A list of Hawaii landowners and their AGIs is available, and many of them are well over that limit, and many of them are interested in ACEP. (Rafferty)
- USDA-NRCS made the rule. NRCS puts a lot of money out there, and can fund up to 50% of a conservation easement, and can go even higher for grasslands. Matching

funds must be acquired first, before applying to NRCS. NRCS is very much into protecting working lands and wetlands as well. It is difficult to receive funding because land owners need 50% before applying. However, the AGI limit is a nationwide concern. (Rafferty)

- The NRCS easement coordinator has been based in Alaska instead of Hawai'i (Penn), which has now changed, and the coordinator is operating out of Hawai'i, but not sure if that is permanent or temporary. (Rafferty)
- Vice Chair Abbott mentioned that the question of including ponds and lakes in defining impervious surface would be important, as it was in the case of Hamakua Farms, a Legacy Land project that was not able to close. An impervious surface is generally anything that prevents water from penetrating the ground (Rafferty), including ponds and greenhouses. (Abbott)
- Impervious surface from 2-10% is waivable, but the 10% limit is absolute, which creates a problem for greenhouse and livestock operations with roofs. (Rafferty)
- Mr. Rafferty noted that any suggestions/input about the next Farm Bill, especially from the State and via the congressional delegation, will be useful and greatly appreciated. Commissioner Warshauer asked Mr. Rafferty if he would like the Commission to submit separate input, to which Mr. Rafferty agreed, especially if input includes things unique to Hawai'i farmers. Commissioner Warshauer asked for Mr. Rafferty's help on the request, to which Mr. Rafferty agreed and asked for suggestions on how to do so.

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Vice-Chair Abbott requested a link to the NRCS rules that were just released, which will help educate the commission.

ITEM 5. Adjournment

Chair Menard adjourned the meeting at 3:46 PM.